Leong Siew Fung & Ors v Leong Shan Nam and other suits

HIGH COURT (MIRI) — SUIT NO 22-17 OF 1996(MR), ORIGINATING MOTION NO 25-03 OF 1996(MR) AND ORIGINATING SUMMONS NO 24-05 OF 1996(MR)
IAN CHIN J
7 SEPTEMBER 1998

Civil Procedure *— Contempt of court — Allegation of bias against judge — Advocate alleged that presiding judge would be biased against him and all cases handled by him — Imputation of judicial misconduct — Whether impaired public confidence in the administration of justice — Whether court should act summarily*

Counsel for one of the parties in a case before the court ('the advocate') alleged in letters to the court and thereafter in his submission before it that there was a strong likelihood of bias and partiality on the part of the presiding judge against him in that case and other cases handled by him in the same court. He had in the letters requested for the hearing of one of the cases to be re-scheduled before another judge and subsequently applied for the judge to be disqualified. The issue was whether the advocate had committed contempt of court.

Held, finding the advocate guilty of contempt of court:

The assertion, expressly and by implication — by the advocate — that the judge would not be deciding the cases with regard to the evidence and the law, that is, without regard to where the truth lies, was an imputation of judicial misconduct with the intention of impairing public confidence in the administration of justice. That amounted to contempt of court which justified the court to act summarily (see p 360D).

[Bahasa Malaysia summary

Peguam untuk salah satu daripada pihak dalam kes di hadapan mahkamah ('peguambela tersebut') mengatakan dalam surat-surat kepada mahkamah dan selepas itu dalam penghujahannya di hadapannya bahawa terdapat kemungkinan prasangka dan sikap berat sebelah yang amat besar pada pihak hakim yang bersidang terhadapnya dalam kes itu dan kes-kes lain yang diuruskan olehnya di mahkamah yang sama. Dalam surat-suratnya beliau telah meminta supaya pembicaraan salah satu kes dijadualkan semula di hadapan hakim lain dan kemudiannya memohon supaya hakim disingkirkan. Isu adalah sama ada peguambela tersebut telah melakukan penghinaan mahkamah.

Diputuskan, mendapati peguambela bersalah atas penghinaan mahkamah:

Penegasan itu, secara nyata dan tersirat — oleh peguambela tersebut — bahawa hakim tidak akan memutuskan kes-kes berkaitan dengan keterangan dan undang-undang, iaitu tanpa mempedulikan di manakah terletaknya kebenaran, adalah satu tohmah salah laku kehakiman dengan hasrat menjejaskan keyakinan awam dalam pentadbiran keadilan. Ini samalah seperti penghinaan mahkamah yang memberi justifikasi kepada mahkamah untuk bertindak secara terus (lihat ms 360D).]

Notes

For a case on allegation of bias against judge, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 1084.

Cases referred to

Ambard v A-G for Trinidad & Tobago [1936] AC 322 (refd)
Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors [1995] 2 MLJ 213 (refd)
Lawrie v Roberts & Linton (1882) 4 Coup 606 (refd)
R v Commissioner of Police of the Metropolis, ex p Blackburn [1968] 2 QB 150 (refd)

Suit No 22–17 of 1996(MR):
Florence Lam (*Raymond Lam & Advocates*) for the plaintiff.
Tai Choi Yu (*Tai Choi Yu & Co*) for the defendant.

Originating Motion No 25–03 of 1996(MR):
Tai Choi Yu (*Tai Choi Yu & Co*) for the applicant.
Susan Gau (State Counsel, Sarawak Attorney-General's Chambers) for the respondent.

Originating Summons No 24–05 of 1996(MR):
Tai Choi Yu (*Tai Choi Yu & Co*) for the plaintiff.
Lim Swee Huat (*SH Lim & Co*) for the first defendant.

Ian Chin J: Mr Tai Choi Yu acts for the defendant in Suit No 22–17–96, for the plaintiff in Originating Summons No 24–05–96 and for the applicant in Originating Motion No 25–03–96. Learned counsel in all those cases applied to have me disqualified and for the purpose I heard the three matters together. At the end of the hearing, it was not only that I disallowed the application but I found Mr Tai Choi Yu to be in contempt of court. Since the grounds for not disqualifying myself from hearing the three cases can be found in my finding that Mr Tai Choi Yu is in contempt of court, it will suffice for the purposes of this judgment to reproduce here the whole of the finding:

MALAYSIA
IN THE HIGH COURT IN SABAH AND SARAWAK AT MIRI

RE TAI CHOI YU

(Arising from Originating Summons No 24–94–98(MR); Originating Motion No 25–03–96(MR) and Originating Summons No 24–05–96(MR))

Finding of Contempt of Court by court on its own motion

On 26 August 1998 four out of twenty-nine matters that were fixed for hearing before me in chambers had Tai Choi Yu, an advocate, ('the advocate') acting for one of the parties in all the four matters. The advocate after the receipt of the notice of the hearing of those matters had, in respect of one of them, wrote the following letter, viz:

Tai Choi Yu & Co, Advocates

17 August 1998

The Senior Assistant Registrar,
[etc ...]

Dear Sir,

Re: Miri High Court Originating Motion No 25–03–96(MR)
Yong Yeu Sin v The Public Officer, District Office

We refer to the conversation this morning (Fairuz/Tai) and we refer to the above-captioned case fixed for hearing on 26 August 1998 at 9am.

We shall be obliged if you will kindly re-schedule the above-captioned case on the ground that there is a strong likelihood of bias and partiality on the part of the intended presiding judge, Mr Ian Chin Hon Chong. It is an open secret that the Mr Chin had made many defamatory remarks on our Mr Tai in his judgment in *Takang Timber Sdn Bhd v The Government of Sarawak & Anor* in Suit No MR 26 of 1990. The said case has resulted in three appeals to the Court of Appeal pending hearing. It is our humble considered opinion that our client's interest in his pursuit for justice will be better served if his case be heard before another judge.

In the circumstances, we shall be obliged if you will kindly fix the above-captioned case for hearing on another dated before another judge.

Thank you.

Yours faithfully,
[Signed]
CY TAI
For Messrs Tai Choi Yu & Co

cc (1) The Honourable Mr Justice Chong Siew Fai,
The Chief Judge, The High Court, Kuching.

(2) The State Attorney General
State Attorney General Chambers
Tingkat 16, Wisma Bapa Malaysia,
Petra Jaya, 93502 Kuching.

The court did not reply to the letter, rightly so, because it would not be appropriate to decide on the matter without hearing all the parties.

I then began to sit on 26 August 1998 starting with those matters which were not contentious in order to avoid, as far as possible, lawyers having to wait a long time in court for orders which can be granted in a matter of

minutes. The first of the matter handled by the advocate that came up for hearing that morning was Originating Summons No 24–94–98(MR) (*Wong Siew Ping v Credit Corp Malaysia Sdn Bhd & Anor*) where the advocate, acting for the plaintiff, had also written to the court by a letter of 17 August 1998 to ask for the matter to be re-scheduled and indicating that counsel for the other party had no objection but with no allegations as those contained in the other letter, supra. The court also did not reply the letter. When this matter (Originating Summons No 24–94–98(MR)) was called, another counsel stood in for the advocate and requested an adjournment and referred to the letter whereupon I told counsel that there was no reason given for wanting an adjournment. I refused the adjournment and proceeded to hear the matter. The stand-in counsel was left with the unenviable task of having to reply why the Originating Summons should not be struck out as, learned counsel for the other party contended, it was wholly inappropriate. I upheld the submission and struck out the Originating Summons and I stated that I will give my reasons if there is an appeal.

It was when the second matter, Originating Motion No 25–03–96(MR), which I have at the outset referred to, that the advocate himself appeared. This is what happened as the following notes of proceedings show:

MALAYSIA
IN THE HIGH COURT IN SABAH AND SARAWAK AT MIRI
SUIT NO 22–17–96(MR)

LEONG SIEW FUNG & ORS ... PLAINTIFFS

v

LEONG SHAN NAM ... DEFENDANT

Notes of Proceedings
In Chambers
26 August 1998

12.27pm
Coram: Justice Ian Chin
For plaintiffs: Florence Lam
For defendant: Tai Choi Yu

Tai: If this court pleases, I would like to apply for your lordship to be disqualified from hearing this case on the ground that there is a real likelihood of bias or impartiality. This is because your lordship has made many defamatory remarks against me, both in my personal capacity and in my capacity as a fit and proper person to act as an advocate and solicitor. That case is case No MR 26 of 1990. That case is now presently under appeal to the Court of Appeal. Altogether, there are three appeals to the Court of Appeal on that case and the defamatory remarks contain in the said case is also the subject-matter of the appeals to the Court of Appeal. In the circumstances, I humbly submit that it will be in the best interest on my client if your lordship disqualify yourself from hearing any of my cases until the Court of Appeal

has decided on the said defamatory remarks made by your lordship against me. Second, on this particular case there is also an appeal to the Court of Appeal and that this case cannot proceed until the Court of Appeal has decided on that appeal. Thirdly, I have on 17 August 1998 written to the SAR Miri for adjournment of all my cases fixed for hearing before your lordship and to that we have not been accorded the courtesy of a reply and response in writing. Fourthly, I have in my letter dated 25 August addressed to Messrs Khoo & Co, cc to SAR, Miri, asked that Gabriel Kok to stand in on my behalf and I understand that your lordship had made a decision against him when he has no instruction to argue on our behalf. We feel that the decision in the earlier case 24–28–98 show the real likelihood of bias or partiality in respect to your lordship handling of my cases. For these reasons, I must submit for all the case before your lordship today I am unable to proceed.

12.35am

Court: Could you show me the part of the judgment, which is under appeal, where I am alleged to have said you are not 'a fit and proper person to act as an advocate and solicitor'?

Tai: There is a remark that I should be prosecuted for my action which I did as a lawyer and solicitor in respect to my referral to the Chief Minister of Sarawak. I do not have the judgment. I have also written letter to your lordship and letter to the Chief Justice of Malaysia and to Chief Judge Sabah and Sarawak showing clearly those portions of your judgment which were defamatory of me. I am sure your lordship must have a copy.

Court: There are still two other cases involving Mr Tai, are you going to say the same thing?

Tai: Yes, there are cases tomorrow and also the day after.

Court: In that case, I will call the other counsel involved in the other cases. One other case is Originating Motion No 25–03–96 (*Yong Yeu Sin v The Public Officer, District Office*) and (*Lee Kuet Chin v Tan Kok Sen & Anor*).

Susan Gau: I am for the respondent in Originating Motion No 25–03–96 of which Mr Tai is for the applicant.

Lim Swee Huat: I am for the first defendant in Originating Summons No 24–05–96 of which Mr Tai is for the plaintiff.

Tai: I make the same submission as I made earlier.

Court: For the benefit of the two learned counsel who had just joined us, I wish to read to them what Mr Tai had said in seeking to disqualify me from hearing the cases. [Court read the submission.].

Tai: As for the latter two cases, there are no other grounds for adjournment and disqualification.

12.55pm

Court: I need time to consider what Mr Tai has said and I therefore adjourn to 27 August 1998 at 9am and all counsel are requested to be present. The said three cases which I have mentioned are adjourned to 27 August 1998 at 9am.

Justice Ian Chin

It will be noticed from the notes that another factor, other than those stated in the letter, had been advanced for my disqualification and that is my decision to strike out the said Originating Summons No 24–94–98(MR). It will be noticed also that the advocate referred to a letter which was written much earlier by the advocate and which I reproduce here for the purpose of appreciating the history of the matter, viz:

Tai Choi Yu & Co, Advocates

20 October 1997

Mr Ian Chin Hon Chong
The Tawau High Court
Tawau.

Dear Sir,

Re: Defamatory Remarks in Judgment in Miri High Court Suit No MR 26 of 1990 (*Takang Timber Sdn Bhd v The Government of Sarawak & SEDC*)

DEFAMATORY REMARKS IN JUDGMENT

Your 90 page judgment in the above-captioned suit contained many defamatory remarks about me both as a person and in my professional capacity as a lawyer.

Particulars of at least six instances of defamation, inter alia, are enclosed herewith in the Annexure attached hereto and marked 'A'.

Apart from the aforesaid six instances of defamation, you also made numerous innuendoes which are defamatory of me.

CHALLENGE TO WITHDRAW AND/OR WAIVE IMMUNITY

Though we have never met before the hearing of the above-captioned suit, you chose to throw down the gauntlet. I accept it honourably and wholeheartedly. Now it obliges me to challenge you to withdraw and/or waive your immunity and for you to consent to and to submit to the jurisdiction of the Malaysian courts in order that the truth of the said defamatory remarks be legally adjudicated.

If you believe as the truth that your said defamatory remarks and innuendoes are justified, then you should put your mouth to where your heart is and accept the said challenge. Otherwise, you should know where to shove it.

CAPACITIES OF PARTIES

The letter is written by me and addressed to you in our respective capacities as lawyers and not in any other official capacity whatsoever.

REDRESS AND RESTITUTION

Please note that unless I receive a clear and unequivocal acceptance of the aforesaid withdrawal and/or waiver from you within the next 10 days, I shall take such other steps as I deem necessary to obtain redress and restitution.

Yours faithfully,
[Signed]
CY TAI
For MESSRS TAI CHOI YU & CO

[cc: To Chief Justice, Chief Judge, all practising lawyers in Sabah and Sarawak and all law reports publishers in Malaysia.]

ANNEXURE 'A'

PARTICULARS OF DEFAMATION

'Tai Choi Yu ... an advocate of 28 years standing ... is not a truthful witness,'

'Tai Choi Yu cuts a pathetic figure'.

'He (Tai Choi Yu)... cared not for the truth'.

'When he (Mr Tai Choi Yu) behaved and argued as he did it leaves no doubt that he (Tai Choi Yu) was untruthful.'

'His (Tai Choi Yu's) professional ethic was dangerously close to being compromised by his business pursuit as can be seen by his questionable behavior in writing ... as an advocate ... to the Chief Minister of Sarawak.'

'The letter (Tai Choi Yu's letter to the said Chief Minister) contained a threat ... unnecessarily close to being an extortion or criminal intimidation as envisaged respectively by ss 383 or 503 of the Penal Code.'

What happened in that case, *Takang Timber Sdn Bhd v The Government of Sarawak & SEDC*, was that the advocate had testified and in the end his testimony was the subject of submission by counsel acting for the opposite parties that he was not a truthful witness. It was an issue that I have to decide and the decision was in respect of the facts of that case and which issue I decided giving my reasons covering seven pages of the judgment. I will say no more about this case as it is pending in the Court of Appeal.

I did not respond to the letter because that came from the advocate who virtually owned the plaintiff company of that case and whose claim was dismissed by me after a trial in which the advocate testified for his company during the trial and the words in that letter were, in my view, that of an angry and unsuccessful litigant. My inaction was influenced by the case of *Lawrie v Roberts & Linton* (1882) 4 Coup 606 where it is said that disappointed litigants sometimes feel aggrieved and that some of them are ill-tempered and that they may say or write things which are foolish and reprehensible but that this kind of abuse will generally carry little weight nor will it do much harm to the administration of justice even though it may be expressed in less than respectful terms.

However, the latest allegations, which are advanced as grounds for my disqualification, assume a different complexion and dimension. They go beyond abusing the judge personally. The present allegations of bias are

that because I have ruled unfavourably on his credibility in the said case in which he was a witness, I will now and in future cases in which he acts for a party be biased or impartial against him and as a result bias or impartial against his client. The advocate is also saying that because I have ruled against his client in the matter I have earlier mentioned (in which the advocate had asked someone to stand in for him), that is evidence of my bias or impartiality. Therefore, such an attitude of the advocate means it matters not whether the decision is in accordance with the law or evidence and that as long as a decision by me is against his client, it is perverse. Therefore, the advocate is in effect saying I have and will be deciding cases with no regard whatsoever for what the facts and laws are; that is, with no regard for the truth at all. The only basis the advocate to say that is because I have ruled against his credibility when he was a witness and I have also ruled against his client in said matter heard on 26 August. The advocate had also said other things which are not correct. It is not true for him to say that I have in the said judgment said that he is not a fit person to act as an advocate and solicitor nor was it true that I had said he should be prosecuted. But the advocate had, however, said that he had not a copy of the judgment with him and I will therefore disregard those remarks. Another way of putting the matter is that, the advocate had sought to disqualify me on the ground that I will not be deciding the cases with regard to the evidence and the law, in other words, without regard to where the truth lies. Therefore, the allegations are without any basis at all. Such allegations, in my view, have and will impair the public confidence in the administration of justice.

Generally the courts would be unwilling to treat criticisms of judges, in modern conditions, as being contempt of court unless they are disrespectful in tone or likely to interfere with the administration of justice (*R v Commissioner of Police of the Metropolis, ex p Blackburn* [1968] 2 QB 150. After all, 'Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men' (*Ambard v A-G for Trinidad & Tobago* [1936] AC 322 at p 335).

This case is different. It went beyond that. The allegations had impaired and will impair the public confidence in the administration of justice because the advocate had said expressly and by implication that I will be deciding cases with no regard to the evidence and the law, in other word without regard to where the truth lies. The advocate, as was said in *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213 at p 223, ought to have faith in the court's ability to decide the case upon the evidence and also as much faith in the ability of the Court of Appeal to intervene where a judge has decided a case otherwise than in accordance with the law and the evidence. In fact, the Court of Appeal had in that case (at p 220) sounded the warning the warning which the advocate had chosen to ignore:

> In my judgment, it is a most serious matter to allege bias against a judge whose sole function is to decide a case according to the evidence before him. I notice an unhealthy trend of late to allege bias too readily against a

> judicial arbiter on insufficient material. Nothing is capable of eroding public confidence in the judicial arm of the state than unwarranted and unfounded allegations of bias. It is therefore to be avoided at all costs, if necessary, by having resort to the power to punish for contempt.

In my view, what the advocate had said when seeking to disqualify me from hearing the cases is in contempt of the court. That is not the end of the matter. I agonized over whether to act summarily because on the one hand I must be careful not to use the power to degenerate it into an oppressive or vindictive abuse of it. On the other hand, if I do not act promptly, the confidence of the public in the administration of justice will continue to be eroded since the advocate is inclined to act in similar manner in every matter in which he will be engaged and he will continue to tell his client that this court will not be deciding in accordance with the law or the evidence. I have balanced the two very carefully and I am of the view that it is urgent and imperative to act at once.

Therefore, upon the premises, I find the advocate guilty of contempt of court by asserting, expressly and by implication, that I will not be deciding the cases with regard to the evidence and the law, that is, without regard to where the truth lies. That is an imputation of judicial misconduct with the intention of impairing the public confidence in the administration of justice.

I will give the advocate an opportunity to decide what representation he wishes to make before I impose the penalty on him. For this purpose, I fix 25 September 1998 at 11am in the High Court in Miri, open court, to hear the advocate. For the purpose too, the advocate is ordered to attend court on the said date and time. I would appreciate the attendance on that day of a representative each from the Federal Attorney General Chambers and the Sarawak Advocates Association to act as amicus curiae.

Order accordingly.

Reported by Loo Lai Mee